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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT AND
BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT
OF THE DEPARTMENT OF EMPLOYMENT, *Appellants,*

VS.

THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

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vs.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court for the District of Colorado has not been reported. The Findings of Fact and Conclusions of Law and Supplemental Conclusions of Law and Judgment of the District Court are set forth in the Transcript of Record. (R. 20-29).

JURISDICTION

The judgment of the United States District Court For The District of Colorado was entered on September 15, 1965. (R. 20-28).

The jurisdiction of this Court is invoked under 28 U.S.C., § 1253 since the validity of a permanent injunction issued by a District Court of three judges is drawn in question.

The jurisdiction of this Court, having been invoked under 28 U.S.C., § 1253, is thereby predicated upon two factors: (1) that the District Court had jurisdiction over the suit below, and (2) that a three-judge court was required to hear and decide the suit below. Because the jurisdictional questions presented are so integrally related to the question on the merits, the former cannot be answered without some reference to the latter.

The complaint filed by the Red Cross and the United States as parties plaintiff alleged the Red Cross' immunity from taxes imposed by the Colorado Employment Security Act, on the grounds that the Red Cross was an instrumentality of the United States Government and that the enforcement of the tax against the Red Cross was, therefore, an unconstitutional application of that tax statute (R. 1). The defendant's denial of that allegation raised a substantial federal question never before decided by any federal court: Is the American National Red Cross an instrumentality of the United States Government and thereby immune from unemployment taxes levied by a state? The Red Cross alleged its right to such immunity and the State of Colorado's denial thereof clearly created a case arising "under the Constitution, laws, or treaties of the United States," and since the amount in controversy exceeded $10,000 (R. 2), exclusive of interest and costs, the case was within the original jurisdiction of the District Court under 28 U.S.C. § 1331(a), 72 Stat. 415, which provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court's determination that the Red Cross was an instrumentality of the United States and that the United States itself was a proper party to the suit, also support its jurisdiction under 28 U.S.C. § 1345 which provides:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

The Appellants, Colorado Department of Employment and Bernard E. Teets, respectfully disagreed with the Red Cross' allegation in the District Court that it was an instrumentality of the United States and that the United States was a proper party to the suit, and on these grounds the Appellants alleged and contended that the District Court should not have exercised its jurisdiction, but instead should have required the Red Cross to exhaust its plain, speedy and efficient remedy at law (R. 11) as provided by Colorado Revised Statutes §82-9-9 (1963). The Department of Employment and Teets retain these views and contentions on this appeal.

To the extent that this Court may, in ruling upon the merits of this case, uphold some or all of these views and contentions put forth by the Department of Employment

and Teets (as argued later in this Brief), the result very well may be that this Court will find that the District Court erred in exercising its jurisdiction over the suit below. While such a determination that the District Court had no jurisdiction would *ipso facto* remove one of the prerequisites for this appeal (namely, the requirement under 28 U.S.C. § 1253 that the appeal be from a three-judge court of competent jurisdiction), it in no way prevents this Court from considering the merits of this appeal at the present time. Until this Court controverts the District Court's conclusions of law, the jurisdiction of the District Court under 28 *U.S.C.* §§ 1331, 1345, as based on those conclusions, is sufficient to allow a direct appeal to this Court therefrom. The possibility that the interrelationship of the merits questions and the jurisdictional questions may ultimately result in a reversal of the District Court's findings of jurisdiction, should not, under the circumstances, prevent this Court from exercising its jurisdiction at this time in order to decide the very important issue here presented.

In addition to its dependence upon the District Court's having jurisdiction, the Department of Employment's right to bring this appeal under 28 *U.S.C.* § 1253 depends upon whether or not a three-judge court was required in the trial below. In this regard, 28 *U.S.C.* § 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State stat-

utes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

That the case before the District Court was one within the scope of § 2281 is clear from the complaint filed by the Red Cross (R. 1). The Red Cross sought a permanent injunction restraining the action of the Appellant, Bernard E. Teets, Executive Director of Employment of the Colorado Department of Employment, in his enforcement of the Colorado Employment Security Act. The grounds alleged for such injunction was that application of that Act to the Red Cross would be unconstitutional. These facts show that § 2281 is clearly applicable.

Nor can it be argued that § 2281 applies only where the attack on the state officer is based on the invalidity of the underlying statute as a whole; a challenge of the particular application of the statute is sufficient. *Ex Parte Bransford*, 310 U.S. 354, 361; *Oklahoma Gas Co. v. Russell*, 261 U.S. 290, 292; *Herkness v. Irion*, 278 U.S. 92, 93, 94; *Ex Parte Williams*, 277 U.S. 267, 271. This was the situation in the instant case, since the Red Cross did not challenge the Employment Security Act itself as being unconstitutional, but merely challenged the validity of its application to the Red Cross.

The claim of unconstitutionality in the manner in which the statute was being applied posed a "substantial" question, as is required by the interpretation that has been given § 2281, supra (*Great Northern Railway Co. v. Thompson, D.C.N.D.* 1963, 222 F. Supp. 573). The ques-

tion of whether a particular state statutory scheme is contrary to the U.S. Constitution is always a "substantial" one requiring a three-judge Federal District Court. *Penn. Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261; *Public Utilities Commission of California v. United States,* 355 U.S. 534; *United States v. Georgia Public Service Commission,* 371 U.S. 285; *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713.

For the reasons stated, it is submitted that a three-judge court was required by 28 U.S.C. § 2281 in the instant case. Additional support for this conclusion is found in *Florida Lime and Avacado Growers, Inc. v. Jacobsen,* 362 U.S. 73, where this Court held that § 2281 requires a three-judge court in all cases where an injunction may be granted against the operation of a state statute on grounds of federal unconstitutionality and *Query v. United States,* 316 U.S. 486, where this Court stated a suit by the U.S. to enjoin enforcement of a state tax statute against an Army Post Exchange on grounds that the Post Exchange was an instrumentality of the United States, was required to be decided by a statutory three-judge court.

Having established the requisite foundation for bringing this appeal, namely, that the District Court had jurisdiction and that a three-judge court was required to hear and determine the application for the injunction, it is submitted that this Court has jurisdiction to hear and determine the merits of this appeal under 28 U.S.C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

That such appeals will lie where the suit required the convening of a District Court of three judges is well established. *Rorick v. Bd. of Commissioners of Everglades Drainage District*, 307 U.S. 208; *United States v. Georgia Public Service Commission*, 271 U.S. 285; *Stanback v. Mo Hock Ke Lok Po*, 336 U.S. 368; *Palmetto Fire Ins. Co. v. Connecticut*, 272 U.S. 295.

Perhaps the case most closely on point for establishing the jurisdiction of this Court is *Query v. United States*, 316 U.S. 486, wherein the United States and two Army officers brought suit against the South Carolina Tax Commission to enjoin enforcement of a state tax statute with respect to United States Army Post Exchanges located within the state. The U.S. alleged that post exchanges were instrumentalities of the United States and that imposition of the taxes would interfere with the activities of the United States Government and would be repugnant to the United States Constitution. This Court, in holding that a three-judge federal district court was required to hear the case, said that appeal from a judgment of that court would not lie to the Circuit Court of Appeals, but rather should be brought on direct appeal to the Supreme Court. The *Query* case is precedent for this Court's jurisdiction over the instant case.

It should be noted that since the constitutional claim against Colorado Employment Security Act was substan-

tial, this Court's jurisdiction extends to all of the issues relating to the attack on that Act, whether those additional attacks are based on constitutional grounds or not. *Florida Lime and Avacado Growers, Inc. v. Jacobsen,* 362 U.S. 73, 84; *Public Service Commission v. Brashear Freight Lines,* 312 U.S. 621, 625, note 5; *Railroad Commission of California v. Pacific Gas and Electric Co.,* 302 U.S. 388, 391; *Sterling v. Constantin,* 287 U.S. 378, 393, 394.

For all of the reasons stated above, the Appellants, Department of Employment and Bernard E. Teets, submit that the jurisdiction of the Supreme Court to entertain this direct appeal from the United States District Court for the District of Colorado is well established and extends to all the issues presented.

QUESTIONS PRESENTED

The following questions are presented on appeal to this Court:

1. Whether the Appellee, American National Red Cross is an instrumentality or an agency of the United States.

2. Whether the Appellee, American National Red Cross was precluded from obtaining relief in the United States District Court because it failed to bring its suit for refund of taxes in the State District Court in and for the City and County of Denver, State of Colorado, as required by *the*

Colorado Employment Security Act, Colorado Revised Statutes § 82-9-9 (1963).

and,

3. Assuming arguendo that the American National Red Cross is an instrumentality or agency of the United States, whether the Congress of the United States by its 1960 amendments to the Federal Unemployment Tax Act has waived the constitutional immunity of the Appellee, American National Red Cross from the taxation provision of the *Colorado Employment Security Act, Colorado Revised Statutes* (1963).

STATUTES INVOLVED

The following federal statutes are set forth in Appendix A hereto:

1. 10 U.S.C. Section 2602(a), (e), 70A Stat. 145.
2. 12 U.S.C. Section 5(a), 48 Stat. 147.
3. 12 U.S.C. Section 30, 24 Stat. 18.
4. 12 U.S.C. Section 55, 19 Stat. 64.
5. 12 U.S.C. Section 71(a), 49 Stat. 704, 708.
6. 12 U.S.C. Section 93, 36 Stat. 1167.
7. 12 U.S.C. Section 192, 49 Stat. 721.
8. 12 U.S.C. Section 215(a), 73 Stat. 460.
9. 26 U.S.C. Section 3301, 74 Stat. 980.
10. 26 U.S.C. Section 3305(b), 74 Stat. 983.

11. 26 U.S.C. Section 3306(c)(6),(8), 74 Stat. 983, 984, 986.
12. 28 U.S.C. Section 1253, 62 Stat. 928.
13. 28 U.S.C. Section 1331(a), 72 Stat. 415.
14. 28 U.S.C. Section 1341, 62 Stat. 932.
15. 28 U.S.C. Section 1345, 62 Stat. 933.
16. 28 U.S.C. Section 2281, 62 Stat. 968.
17. 36 U.S.C. Section 2, 61 Stat. 81.
18. 36 U.S.C. Section 3, 67 Stat. 178.
19. 36 U.S.C. Section 5(a)-(c), 61 Stat. 82.
20. 36 U.S.C. Sections 7, 17b, 67 Stat. 179.
21. 42 U.S.C. Section 1855(a), 76 Stat. 111.

The following Colorado statutes are set forth in Appendix A hereto:

1. Colorado Revised Statutes, Section 82-1-3(8)(e) (1963).
2. Colorado Revised Statutes, Section 82-9-9 (1963).

STATEMENT

The Appellee, The American National Red Cross (hereinafter referred to as "Red Cross") is organized and exists by virtue of an Act of the Congress of the United States of America, (*Title* 36 *U.S.C., Section* 1, *et seq.*) which provides that it is a body corporate politic in the District of Columbia. The Red Cross does not have its principal place of business in the State of Colorado.

However, it has a number of chapters in the State of Colorado which employ a considerable number of employees in said state. The Appellant, Department of Employment, is an agency of the State of Colorado, charged with the function of administering the *Colorado Employment Security Act* for the State of Colorado (*Chapter* 82, *Colorado Revised Statutes,* 1963). The Appellant, Bernard E. Teets, is the Executive Director of the Colorado Department of Employment and as such is the head of the Department of Employment.

The State of Colorado is one of three states which taxes non-profit organizations for unemployment taxes under its Employment Security Act. The Department of Employment is also authorized by the Colorado legislature to tax agencies or instrumentalities of the United States government under the provisions of *Section* 82-1-3(8)(e), *Chapter* 82, *Colorado Employment Security Act, Chapter* 82, *Colorado Revised Statutes,* 1963, in instances where immunity is waived by the Congress of the United States.

Prior to the commencement of this suit, the Department of Employment determined that the Appellee, Red-Cross, was subject to the *Colorado Employment Security Act,* supra, and demanded payment of unemployment taxes by the Red Cross and its chapters be made together with interest thereon, provided for by the *Colorado Employment Security Act,* supra.

Thereafter, and prior to commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest by the Red Cross to the Department of Employment. Each of said payments was accompanied by an application for refund, each of which

was denied by the Department of Employment prior to the commencement of this suit. Subsequent to the denial of the refunds by the Department of Employment, the Red Cross commenced this suit in the United States District Court, for the District of Colorado joining with them the United States of America as a party plaintiff (R. 1).

In its Complaint, the Red Cross alleged that it was an instrumentality of the United States (R. 2), the kind described by 26 *U.S.C., Section* 3306(c)(6)(B), and, as such, continues, because of the express exception made in 26 *U.S.C., Section* 3305(b) to be immune under the United States Constitution from any requirements to make contributions to any state for unemployment compensation taxes (R. 2, 3). The Red Cross further contended that it was an instrumentality of the United States of the kind described by 26 *U.S.C., Section* 3306(b)(6)(B) because of the provisions of 26 *U.S.C., Section* 3306(c)(8), which they contend specifically exempted the Red Cross from taxation under the Federal Unemployment Tax Act (R. 2).

The United States of America was joined as a party plaintiff in this suit under the direction and authorization of its Attorney General because of its interest as sovereign in having *Section* 3305(b) and *Section* 3306(c)(6), supra, properly construed and applied and avoiding infringement of the immunity from state and local taxation, which the United States and Red Cross, as its alleged instrumentality, performing functions essential to the military and civil interests of the United States, allegedly enjoy under the United States Constitution (R. 3).

Subsequent to the filing of the Complaint, the Depart-

ment of Employment moved to strike the United States of America as a party plaintiff (R. 5) and moved to dismiss the Complaint of Red Cross on the grounds that the Court did not have jurisdiction over the subject matter or the parties (R. 5). The Appellees filed a Motion for Summary Judgment contending that the suit was one that the District Court could decide without determination of factual issues and without the need of the Department of Employment filing its Answer (R. 6). The District Court denied the Red Cross Motion for Summary Judgment, granting the motion of the Department of Employment to strike the United States of America as a party plaintiff, and denied the motion of the Department of Employment to dismiss the claim of the Red Cross (R. 9).

Thereafter, the Department of Employment filed its Answer denying that the Red Cross was an instrumentality of the United States government (R. 10) and alleging in the alternative that if the Court found that the Red Cross was an instrumentality of the United States that it was not exempt from taxation under the *Colorado Employment Security Act,* supra, because the Congress of the United States had not specifically exempted it under the provisions of the *Federal Unemployment Tax Act,* 26 *U.S.C., Sections* 3305 *and* 3306 (R. 10). The Appellants in their Answer, as a separate and affirmative defense, alleged that the District Court did not have jurisdiction over the subject matter and that the District Court did not have jurisdiction over the Appellants (R. 11). Upon presentation of evidence and oral arguments, the District Court, sitting as a Three Judge Court, ruled that the United States of America was a proper party plaintiff to

this action, thereby reinstating the United States as a party plaintiff; that the Red Cross was an instrumentality of the United States; and that its immunity as a federal instrumentality had not been waived by the Congress of the United States in its 1960 amendments of the Federal Unemployment Tax Act (R. 20-28).

In its Supplemental Conclusions of Law and Judgment, dated September 15, 1965, the Three Judge District Court permanently enjoined the Department of Employment and its officers, agents, and employees from assessing or collecting any contributions, taxes, interest, or penalties against or from the Red Cross under the *Colorado Employment Security Act,* supra, and rendered judgment in favor of the Red Cross and against the Department of Employment in the sum of $27,927.79, together with the costs of the Red Cross taxed by the Clerk of the District Court (R. 28).

SUMMARY OF ARGUMENTS

The American National Red Cross is not an instrumentality of the United States, and Congress has clearly expressed its intent in this regard. Because the terms "instrumentality" and "agency" are used interchangeably, the provision in the *National Disaster Act* that the Red Cross is not a federal agency is evidence of a Congressional intent that the Red Cross should not be an instrumentality of the United States. This intent is further evidenced by the provision in the original *American National Red Cross Act* itself, where Congress declared that employees of the Red Cross are not to be considered to be employees of the federal government. The voluntary nature of the working relationship between the Red

Cross and the United States, the lack of any supervision or control by the government over the Red Cross, and the fact that more than half of all Red Cross expenditures and activities are directed into private, non-governmental channels, give additional support to the contention that the Red Cross is not a federal instrumentality. Attempts at drawing analogies between the Red Cross, national banks, and Army post exchanges fail to support the Red Cross' argument that it is a government instrumentality. Consideration of such factors as governmental supervision and governmental economic involvement, which caused the courts to find that both national banks and post exchanges are government instrumentalities, clearly leads to an opposite conclusion in the case of the Red Cross. Being neither wholly nor partially owned by the United States, and receiving no financial assistance therefrom, the American National Red Cross is an independent charitable corporation, engaged primarily in private, non-governmental services and governed solely by its own Board of Governors. A state unemployment compensation tax imposed upon such an organization clearly works no hardship upon the government; nor does it materially restrict the activities of the Red Cross in the performance of the services which it does render to government personnel. From all that has been said, it may properly be concluded that the American National Red Cross is not an instrumentality of the United States government.

It is well established, by statute and case law alike, that the Federal District Courts shall not exercise their jurisdiction to enjoin collection of any state tax if there is a plain, speedy and efficient remedy available in the state courts. The *Colorado Employment Security Act* made specific provision for employers to apply for refunds of

tax payments erroneously collected and for the bringing of suit in the state courts if the application should be denied. The Red Cross refused to utilize this state court remedy, alleging that the *Colorado Employment Security Act's* prohibition on the recovery of interest in such a proceeding made the state remedy inadequate. It has been held in a number of well-reasoned decisions that such denial of interest does not, by itself, make the remedy inadequate. Therefore, the District Court erred in exercising its jurisdiction over this matter without first requiring the Red Cross to exhaust its state remedies. Furthermore, the State of Colorado had not waived its sovereign immunity with respect to suits in federal court, and thus, the District Court had no jurisdiction over the Appellant, Department of Employment.

Assuming arguendo, that the Red Cross is an instrumentality of the United States, Congress has nevertheless waived any tax immunity to which it would otherwise be entitled in the instant case. The Red Cross denies the existence of this waiver on the grounds that the Red Cross is included in the class of instrumentalities to which the waiver of immunity does not apply. This contention must fail in the light of the plain meaning of the statutes involved. The Red Cross' argument is ultimately dependent upon a finding that 26 *U.S.C., Section* 3306(*c*)(8) refers specifically to *Section* 3301 of that Title. A careful reading of the statutes reveals that no such specific reference appears therein. At most, there is a broad general reference to the entire chapter in which *Section* 3301 is located. A general reference to an entire chapter will not suffice when a specific reference to a particular section is required. Therefore, the Red Cross' argument must neces-

sarily fail. Nor can legislative history in the form of Congressional debates be resorted to, since the statutes in question are unambiguous and since such debates are totally unreliable as aids in construing a statute.

ARGUMENTS

I.

THE AMERICAN NATIONAL RED CROSS IS NOT AN INSTRUMENTALITY OF THE UNITED STATES, WAS NOT INTENDED BY CONGRESS TO HAVE SUCH STATUS, AND HAS ITSELF DEMONSTRATED THIS FACT BY THE NATURE OF ITS OPERATIONS AND ACTIVITIES.

The term "instrumentality," as it is used to denote a relationship between some person or thing and the United States government, has been used by the courts repeatedly. It is significant to note that "the terms 'Federal agency' and 'Federal instrumentality' are used interchangeably." *Capitol Building and Loan Association v. Kansas Commission,* 83 *P.2d* 106, 111, 148 *Kan.* 446. This Court has itself used the terms interchangeably. *Clallam County v. United States,* 263 *U.S.* 341, 344, 345 (where the Court referred to a corporation alternately as an "instrumentality for carrying on the war . . ." and also as an "agent . . . created . . . for the sole purpose of producing a weapon for the war."). Similarly, in a case where a corporation's relationship to the state government for purposes of tax immunity was contested, the New York Court of Claims implied that the terms "instrumentality" and "agency" were synonomous, both of them contemplating

an entity to which has been delegated the powers necessary to carry out governmental activities. *Ciulla v. State,* 77N.Y.S.2d 545, 550, 191 Misc. 528.

Although Congress has never expressly stated whether or not the Red Cross is an instrumentality of the United States, its intent in this regard is clearly discernable from some of the relevant statutes. Since the terms "agency" and "instrumentality" are considered to be synonomous and interchangeable, it should be noted that Congress, in the *National Disaster Act,* 42 *J.S.C., Section* 1855(*a*), 63 *Stat.* 1109 has provided that the term "Federal agency" does not include the American National Red Cross. Congress could not have expressed itself more clearly than this; the Red Cross is simply not intended to be a United States agency or instrumentality. Furthermore, in a 1953 Amendment to the American National Red Cross Act of 1947, Congress provided that "[E]mployees of the American National Red Cross shall not be considered to be employees of the Federal Government of the United States." (36 *U.S.C., Section* 17(*b*), 67 *Stat.* 179; this provision was repealed in 1956 and replaced with 10 *U.S.C., Section* 2602(*e*), 70*A Stat.* 145, which provides: "[E]mployees of the American National Red Cross may not be considered as employees of the United States." In fact, Red Cross employees receive no federal assistance other than the usual Social Security benefits (R. 108).

If Congress had any intention that the Red Cross should be an agency or instrumentality of the United States, such intent has never been manifested. Quite to the contrary, the only clear intent of Congress which can validly be gleaned from the foregoing statutes is that the Red Cross is not an instrumentality or agency of the

United States. The Secretary of Labor has reached a similar conclusion. Regulations issued by him under the Walsh-Healy Act, regulating contracts made and entered into by, e.g., "instrumentalities of the United States," provide that "the American Red Cross and the Salvation Army are not such agencies or instrumentalities of the United States . . ." 1944-1945 *WH Man., Supplement to Rules and Interpretations, Section* 1, *p.* 1118.

Further indication of Congressional intent can be found by reference to the context in which the American National Red Cross Act is found in the United States Code. The statutes creating the Red Cross and setting forth its purposes are found in *Title* 36, entitled *"Patriotic Societies and Observances."* Other non-instrumentalities created by various sections of that title include: Daughters of the American Revolution, American Historical Association, Boy Scouts, Girl Scouts, American Legion, Grand Army of the Republic, Disabled American Veterans, and Veterans of Foreign Wars. Each of these was created to perform services which Congress believed to be important, and each of them was authorized to carry out those functions. Yet, it would hardly be contended that the Boy Scouts or the American Historical Association are instrumentalities of the United States. Congress apparently considered the organizations created in *Title* 36 to be on an equal plane, having similar legal status as patriotic societies. The similarity of the particular provisions creating each of these organizations bears out this conclusion.

One very significant indication that Congress had no intention of making the Red Cross a federal instrumentality is the fact that it retained no real control over the

Red Cross at the time of its creation. All Red Cross activities and functions are carried out voluntarily, not at the command of the United States. As Mr. Raymond Yingling, Assistant Legal Advisor to the State Department, pointed out in his testimony at the trial below, there is no provision requiring the Red Cross to render services to the armed forces of the United States in the event that it did not voluntarily offer to do so. (R. 58). The important point to be borne in mind is that, although the Red Cross Act sets forth the purposes of the Red Cross, this is merely an "authorization" to perform services; it imposes no "duties" to perform those services. In fact, that Act specifically provides that the Red Cross' purposes shall be: "to furnish *volunteer aid*" to the armed forces and to give "*voluntary* relief" in matters of communication between our military men and their families and friends at home. (36 *U.S.C., Section* 3, 67 *Stat.* 178; Emphasis added) It is submitted that if the Red Cross had, in fact been intended by Congress to be an instrumentality of the United States, there would have been an imposition of duties to perform these services, not a mere authorization to do so voluntarily.

This contention finds support in the fact that the President of the United States has power only to "accept the cooperation and assistance of the American National Red Cross" (10 *U.S.C., Section* 2602(a), 70A Stat. 145) and not the power to order the Red Cross to render such assistance. Nor are Red Cross personnel subject to the commands of United States military officers in the field to any greater extent than any other civilian would be. These facts are more suggestive of an autonomous relationship between the United States and the Red Cross

than they are of the latter's being an instrumentality of the former.

On the domestic scene, during times of national disaster, the Red Cross' working relationship with the United States government is no less independent than it is on the battlefield. All regulations concerning logistical support to disaster areas are determined by voluntarily bilateral agreements between the United States and the Red Cross (R. 84). The Red Cross works only in the private sector, aiding individual victims, while government funds are diverted solely to the public sector (R. 86; 79). No federal funds are appropriated to the Red Cross to assist it in its task. Clearly, a corporation rendering *voluntary* relief to *private* victims from wholly *private* funds cannot be considered to be an instrumentality of the United States.

Instead of being a government instrumentality, the status of the Red Cross is more nearly analagous to that of an independent contractor who enters into bilateral agreements with the United States by tendering his services and having them accepted. It is well-established that "the mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter." *Buckstaff Bath House Co. v. McKinley,* 308 *U.S.* 358, 362, 363; *Accord, Trinityfarm Construction Co. v. Grosjean,* 291 *U.S.* 466; *Curry v. United States,* 314 *U.S.* 14. Even where the federal government assisted a city in the building of a bridge for purposes of interstate commerce and to assist in military functions, the city's attempt to invoke tax immunity for this limited purpose on grounds of its being a federal instrumentality was rejected by the court; even though

the city had governmental functions, had received governmental funds, and we subject to quasi-governmental supervision. *Miller v. Greenville,* 138 *F.2d* 712. If the city of Greenville was not an instrumentality under those circumstances, much less is the Red Cross capable of having such status, in light of the fact that the latter neither receives government funds nor is it subject to government supervision.

The Appellee, Red Cross, has contended that the power of the President of the United States to appoint eight members of the Board of Governors of the American National Red Cross, including the Chairman thereof, is an indication of Congressional intent to retain governmental supervision over the Red Cross and thereby make it a federal instrumentality. It is respectfully submitted that this contention is unfounded. To be sure, the President does appoint eight Governors, but more importantly, the remaining 42 Governors are elected to their positions, thirty by the various chapters, and twelve by the Board of Governors itself. 36 *U.S.C., Section* 5 (*a*)-(*c*), 61 *Stat.* 82. Furthermore, of the eight Governors appointed by the President, only one, the Chairman, must serve on the executive committee, the group which "when the Board of Governors is not in session, shall have and exercise all the powers of the Board of Governors. . . ." 36 *U.S.C., Section* 5, 61 *Stat.* 82. It is also noteworthy that the requirement that he serve on this committee was imposed by the Red Cross itself in its by-laws (*By-Laws of the American National Red Cross, Section* 3.01), not by Congress. Thus, the Red Cross Act does not itself require that any of the Presidential appointees serve on the executive committee. It was Congress' clear intent that when the Board of

Governors was not in session, the Red Cross could be governed entirely by non-presidential appointees if the Governors so desired.

It is submitted by the Appellants that, since the Red Cross was established as an independent corporation, governed in all matters by a majority vote (R. 102) of its Board of Governors (a substantial majority of which are elected, and not appointed) and by decisions of its executive committee (none of which was required by Congress to be appointed by the President), there is no support for the Red Cross' contention that the mere appointment of eight Governors by the President can be called governmental supervision of Red Cross activities.

The American National Red Cross has itself demonstrated its desire not to become an arm of the government, subject to its control and supervision. In fact, this independent status is expressly required by a provision adopted by the International Red Cross Conference in 1948 (R. 53-54). That provision states one requirement of a national Red Cross society as follows: "Be an institution whose autonomous status allows it to operate in conformity with the fundamental principles of the Red Cross as formulated by the International Red Cross Conference." (R. 53154). The international governing body is quite specifically telling all of the national societies that their membership in the international Red Cross organization requires autonomy from the governments which they serve, and the American National Red Cross has complied completely with these directives.

The American National Red Cross employs *private* certified public accountants to conduct their annual audit

(R. 103) even though the Department of Defense also conducts such an audit. In fact, even the latter audit is paid for entirely with Red Cross funds and is not financed by the government. 36 *U.S.C., Section* 7, 67 *Stats.* 179.

The Red Cross retains *private* general counsel in Washington (R. 103) and local *private* counsel across the country (R. 103). Similarly, it is insured by a *private* insuror (R. 103), and maintains its own retirement and workmen's compensation programs for its employees, who are not included under the federal civil service program (R. 103).

All motor vehicles owned by the Red Cross are titled in the name of the American National Red Cross and bear the license plate of the state in which they are principally operated (R. 105), and all Red Cross drivers are required to have valid drivers licenses from the local state (R. 105). These facts are consistent with the Red Cross' not being an instrumentality of the United States.

In this same vein, it is noted that Red Cross nurses, when they perform services in various states, obtain licenses in those states before they perform those services (R. 109).

In the trial below, the Appellee attempted to draw an analogy between the American National Red Cross, national banks, and Army post exchanges, the latter two having previously been found to be instrumentalities of the United States. *Starr v. O'Connor, C.C.A. Mich.,* 118 F.2d 548, 555; *Query v. United States,* 316 U.S. 486; *Standard Oil Co. of California v. Johnson,* 316 U.S. 481. The reference to national banks is erroneous for two rea-

sons. First, the primary function of national banks is to carry out a governmental function; namely, the maintenance and control of the stability of the national monetary system; the primary function of the Red Cross is not similarly governmental. Less than half of the normal expenditures of the Red Cross are for services to the armed services of the United States (R. 100). A majority of its funds and activities are channeled into such non-governmental functions as private disaster relief, swimming instruction, first-aid classes, nutrition service, blood donor services, etc. Second, the United States government exercises considerable control over national banks. In particular, the various National Bank Acts provide for the cancellation of bank franchises for violation of the provisions of those Acts (12 *U.S.C., Section* 93, 36 *Stat.* 1167) and require that the Comptroller of the Currency approve all consolidations and mergers (12 *U.S.C., Section* 215(*a*), 73 *Stat.* 460), all issuance of preferred stock (12 *U.S.C., Section* 51(a), 49 Stat. 720, and any change of name or location of a national bank (12 *U.S.C., Section* 30, 24 *Stat.* 18). And even more significant, the Comptroller of the Currency may put a national bank into receivership for default in payment of circulating notes (12 *U.S.C., Section* 192, 49 *Stat.* 721), for refusal to pay up impairments in its capital stock (12 *U.S.C., Section* 55, 19 *Stat.* 64), and for violations of provisions concerning directors (12 *U.S.C., Section* 71(*a*), 49 *Stat.* 704, 708). These kinds of governmental controls and supervision are consistent with, and indications of, the fact that national banks are instrumentalities of the United States. Conversely, the lack of any such controls imposed upon the Red Cross is consistent with, and indication of, the fact that the Red Cross is not such an instrumentality. Congress has made

no attempt whatsoever to impose any form of rigid governmental supervision upon the Red Cross, nor were any sanctioning measures established. This further establishes the independent, non-governmental status of the Red Cross.

Just as no valid analogy can be drawn between the legal status of national banks and that of the Red Cross, neither are there any pertinent similarities between Army post exchanges and the Red Cross. Post exchanges have been held by this Court to be instrumentalities of the United States upon the grounds that: 1) Congress has repeatedly made substantial appropriations to such exchanges; 2) money from disbanded exchanges goes into the Federal Treasury; 3) the commanding officer of a post exchange receives his only compensation therefor from the United States Army; and 4) all profits go to improve the general welfare of the armed forces. *Standard Oil Co. of California v. Johnson,* 316 U.S. 484, 485. Applying these particular factors to the Red Cross, it is seen that: 1) Congress has made no appropriations to the Red Cross; 2) no money obtained by the Red Cross goes into the Federal Treasury; 3) Red Cross officials receive no salary from the United States; and 4) profits revert to the general Red Cross fund. Thus, the reasons for finding post exchanges to be federal instrumentalities require an opposite result in the case of the Red Cross, and any attempt at drawing an analogy must necessarily fail. Quite obviously, the decisions holding national banks and post exchanges to be government instrumentalities give more support to Appellants' position.

The American National Red Cross is by no means unique in the kinds of services it performs, either on the

battlefield or on the domestic scene. The Salvation Army has for many years performed similar voluntary relief services, not only to our service men, but to individual victims of local disasters as well. In Veterans Administration hospitals, the Red Cross is "just one of any number of organizations that offer volunteer services . . . ." (R. 108). Other organizations giving similar services include the American Legion, Veterans of Foreign Wars, Disabled American Veterans, etc. And in helping veterans process their claims for government benefits to which they are entitled, not only the Red Cross, but these same other accredited organizations, offer their services (R. 108). The point is simply that the Red Cross, while seeking to invoke a unique legal status, has made no showing of unique servies or activities to support that status or help provide a foundation therefor.

In 1939 the Supreme Court of North Carolina set forth a test for determining whether or not an organization is a governmental instrumentality, and it is submitted that factors listed therein as being determinative are basically sound and logical. *Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Co.*, 2 S.E.2d 592, 596, 215 N.C. 491. The question presented in that case was whether or not a state bank was a federal instrumentality by virtue of its being a member of the Federal Reserve system and the Federal Deposit Insurance Corporation. In holding that the bank was not an instrumentality, and that the North Carolina Unemployment Compensation Act was therefore applicable, the court said:

> "* * * In the borderline cases in which it does not appear that the agency is or is not an instrumentality

> of government, important factors, among others, which must be considered in determining that such agency is an instrumentality of government are: (1) It was created by the government; (2) it is wholly owned by the government; (3) it is not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. * * *"

The court placed particular emphasis on the significance of whether or not the proposed tax would work an economic hardship upon the government, pointing out that if the tax was in fact to be paid out of government money, the agency in question would usually be classed as a government instrumentality. The logic here is sound. The real purpose of governmental immunity from taxation is to prevent undue burdens being placed on the Federal Treasury. Certainly, there is little argument in support of vesting such immunity in an organization whose funds are entirely private.

Considering each of the factors set forth in turn, it is seen that the American National Red Cross was, in fact, created by Congress. 36 *U.S.C., Section* 2, 61 *Stat.* 81. However, that fact alone is by no means sufficient to make an organization an instrumentality of the federal government. Quite to the contrary; although a number of patriotic societies have been created by Congress (36 *U.S.C., Sections* 2-479, 61 *Stat.* 81 *et. seq.*), it would hardly be contended that these societies, such as the Boy Scouts,

American Historical Association, etc., are thereby federal instrumentalities.

Turning then to the remaining three factors, it is seen that the American National Red Cross is neither wholly nor partially owned by the United States.

Furthermore, the testimony given below revealed that the Red Cross' primary function is not the performance of an essential governmental function. Of the four duties imposed upon the local chapters of the Red Cross, only one—giving service to the armed forces—is related to any governmental function, and less than half of the Red Cross budget goes for such services (R. 100). The other three—disaster relief, fund appeals, and interpreting the Red Cross to local communities (R. 100)—are clearly non-governmental functions. This becomes more obvious when it is realized that even the disaster relief programs of the Red Cross are limited to giving assistance to private victims, while the government funds are diverted solely to the public sector. (R. 79). Thus, in times of national disaster, the essential governmental functions and the Red Cross functions are entirely separate. The result is quite simply that the Red Cross' primary function is non-governmental.

With reference to the last factor to be considered—the burden imposed by the tax—it is obvious that since no federal funds whatsoever are paid into the Red Cross treasury (R. 72, 73, 85), there would be no economic burden on the United States by the imposition of the tax provisions of the *Colorado Employment Security Act* against the Red Cross. The major source of the Red Cross' in-

come is the annual appeal to the public, supplemented by earnings of the endowment and general funds (R. 106). To levy a tax to be collected out of such privately collected funds certainly imposes no economic burden on the federal government. Nor is the burden sufficient to impair the Red Cross' efficiency in performing its important services. The Colorado tax is relatively insignificant each year in comparison to annual expenditures of over $133 million (1946 Annual Report of the American National Red Cross, Pl. Ex. 18, p. 168). The Red Cross' ability to render these services would not be materially affected by the very slight burden imposed by the collection of state unemployment compensation taxes.

Thus, although the Red Cross was created by Congress and may be a non-profit organization, the facts remain that it is neither wholly nor partially owned by the government, that its primary function is non-governmental, and that the tax in question would neither burden the government nor impair the Red Cross' effectiveness. These factors are sufficient to establish the Red Cross' status as a non-instrumentality of the United States. The American National Red Cross is an independent, non-governmental organization whose position was eloquently and very accurately set forth by its national chairman, Mr. Basil O'Connor, in 1946:

> "[T]he International Red Cross Committee has always maintained that the national societies, while cooperating closely and cordially with their own governments and with other agencies, would at the same time remain independent.
>
> This explains to a certain extent the unique posi-

tion of the American Red Cross in the life of the country. Cooperating closely with the government, *it is in no sense a part of government;* working hand in hand with many agencies, it still retains its freedom of action . . . (1946 *Annual report of the American National Red Cross, p.* 20; Pl. Ex. 18 (R. 96-97) Emphasis added)"

For the reasons that have been set forth, the Appellants submit that the American National Red Cross is not an instrumentality of the United States, that Congress never intended it to have such status, and that the Red Cross has made every effort to retain its independent nongovernmental status. The humanitarian goals and purposes to which the Red Cross subscribes are respected by all, but even the most humanitarian and charitable organizations must share the burden of tax liabilities legally imposed by proper taxing authorities.

The Red Cross not being an instrument of the United States, it follows that the United States was not a proper party to the proceeding below. Although Federal Rule of Civil Procedure 8(2) specifically requires a statement by the plaintiff showing that he is entitled to relief, the United States' only attempt at stating a claim for relief was set forth in paragraph 12 of the Complaint (R. 3), which merely provided that the United States agreed with the Red Cross in its interpretation of two United States statutes and that it joined in this suit because of its interest in having those statutes properly construed. These allegations were immaterial to the claim of the Red Cross and by themselves did not state a claim for relief. The Appellee failed to show that the United States was en-

titled to any relief, and the United States did not make any demands for any form of judgment to which the United States as plaintiff to this suit in the District Court was entitled. In its brief in opposition to the Appellants' motion to dismiss the United States, the Red Cross contended that the United States need not have a pecuniary interest in the suit, relying variously upon the following cases: *United States v. Fitzgerald,* C.C.A. 8th Cir., 201 Fed. 295; *In re Debs,* 158 U.S. 564; *United States v. New Orleans Pac. Ry. Co.,* 248 U.S. 507; *United States and Bottomley v. Arlington County, Commonwealth of Virginia,* 326 F.2d 929. It is true that the United States need not have a pecuniary interest in order to join in this action as a party plaintiff, but that is not to say that no interest in all will suffice. For, as this Court said at page 518 of the *New Orleans Pac. Ry.* case, supra,: "an interest or concern arising out of an obligation to those for whose benefit the suits are brought" will suffice in lieu of a pecuniary interest. This is the theme which seems to run throughout the cases upon which the Appellees relied below. Such an interest and obligation were the precise reasons that the United States was allowed to bring suit as a party plaintiff in the *Bottomley case,* supra. Bottomley was an officer in the United States Navy, and this gave the United States an interest "involving the national defense." *United States and Bottomley v. Arlington County, Commonwealth of Virginia,* 326 F.2d 929, 932. Similarly, in the *Fitzgerald* case, supra, the United States was attempting to protect an individual in whom they had a legitimate interest. In that case, the defendant, Fitzgerald, had fraudulently obtained certain wool from an Indian on a United States Indian reservation. The Indian was not only a resident of the federal reservation, but his

government allotments and personal property were under the control, supervision and management of the United States. The United States' interest and obligation to protect this individual under this special circumstances is in no way analagous to the instant case. The Red Cross is certainly not a ward of the federal government, nor is its property under the control and supervision thereof. The interest and obligation of the United States to the persons in whose behalf these various suits were brought was simply not present in the instant case. Therefore, those cases are not applicable here. The *Debs case,* supra, is equally distinguishable for the reasons that: 1) this Court found in that case that the government did have a property interest in the subject matter of that controversy (U. S. mail), and 2) the government had specific "powers and duties" relating to the U. S. mail, giving it a right to invoke the courts' aid in the exercise and discharge thereof. *In re Debs,* 158 U.S. 564, 584. In the instant case, the United States had neither a property interest in the suit nor any particular powers or duties relating thereto. The law governing situations where the United States seeks to bring a suit as a party plaintiff was succintly summarized by this court as early as 1887, when it said:

> "[I]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, . . . it can no more sustain such an action than any private person could under similar circumstances. *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 286."

It is submitted that, for the reasons given, the United

States was not a proper party plaintiff to the suit brought in the District Court, and that the District erred in denying Appellants' motion to dismiss.

II.

THE AMERICAN NATIONAL RED CROSS FAILED TO EXHAUST ITS PLAIN, SPEEDY AND EFFICIENT REMEDY IN THE COLORADO STATE DISTRICT COURT AS PROVIDED BY THE COLORADO EMPLOYMENT SECURITY ACT. THE FEDERAL DISTRICT COURT SHOULD NOT HAVE EXERCISED ITS JURISDICTION WITHOUT REQUIRING SUCH EXHAUSTION.

28 *U.S.C., Section* 1341, 62 *Stat.* 932 *provides:*

> "The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Thus, it has been repeatedly held that federal courts will not restrain state officers from collecting state taxes if the state laws afford the taxpayer an adequate remedy by which to pursue his grievance. *Matthew v. Rogers,* 284 U.S. 521; *Toomer v. Witsell,* 334 U.S. 385. A plaintiff is simply not entitled to relief by injunction in federal court against a state statute where he fails to show that his federal rights could not be preserved by proper proceedings in a state court. *Wreiole v. Waterfront Commission of New York Harbor,* D.C.N.Y. 1955, 132 F.Supp. 166; *Guerra v. City of Philadelphia,* D.C. Pa. 1940, 30 F.Supp. 791.

It is clear that the facts of the instant case bring it squarely within the scope of *Section* 1341 and the case law relating thereto, provided the state remedy available under the *Colorado Employment Security Act, Colorado Revised Statutes, Section* 82-9-9 was "plain, speedy and efficient." It has been said that the question as to what constitutes a plain, speedy and efficient remedy is not dependent upon any general rule, but upon the facts of each particular case. *State v. Police Court of Seattle,* 128 P.2d 332, 336, 14 Wash.2d 340. Certainly it can at least be said that such a remedy is one "as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors v. Brundy,* 28 U.S. 210, 215; *Payne v. Hook,* 74 U.S. 425, 430.

The Colorado Employment Security Act, Colorado Revised Statutes, Section 82-9-9 provides, in pertinent part, as follows:

> "REFUNDS.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without interest thereon. . . . If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof."

The Red Cross contended in the trial below that this statute did not provide a "plain, speedy and efficient"

remedy because of the inability of an employing unit to receive interest on any money refunded as a result of erroneous payment. This contention is unsound. In the case of *Bucklin Coal Mining Co. v. Unemployment Compensation Commission,* D.C. Mo., 53 F.Supp. 484, 487, the Missouri Unemployment Compensation Law. which provided for refund of erroneous payments "without interest", was held to provide an adequate state remedy, thereby preventing the Federal District Court from exercising its jurisdiction to enjoin collection of future taxes. And in *Corbett v. Printers and Publishers Corp.,* C.C.A. Cal., 127 F.2d 195, 197, the California Retail Sales Act was held to provide a "plain, speedy and efficient remedy even though no interest was allowed on tax refunds for a period of up to thirty days preceding the date of the refund warrant. A similar provision in the California Use Tax Act, prohibiting payment of interest on tax refunds for a period of up to thirty days, was likewise upheld as affording an "adequate remedy at law." *Nevada-California Electric Corp. v. Corbett,* D.C. Cal., 22 F.Supp. 951, 954. Nor has the Red Cross been able to cite any cases specifically making the payment of interest a pre-requisite to a finding that a "plain, speedy and efficient" remedy exists at law. It is submitted that a mere denial of interest does not make the state remedy inadequate. The Red Cross would have been able to obtain a remedy in the Colorado State District Court which was as practical and efficient to the ends of justice as its remedy in the Federal District Court.

The remedy provided under the Colorado Employment Security Act being plain, speedy and efficient, the Red Cross should have therefore brought this action in the Colorado State District Court. The Federal District Court

erred in exercising its jurisdiction over the action without first requiring such exhaustion of the state remedy. The District Court's lack of jurisdiction was made even more serious by the fact that the State of Colorado, while having waived its sovereign immunity to allow suit under the *Colorado Employment Security Act, Colorado Revised Statutes, Section* 82-9-9 in the state courts, did not waive such immunity with regard to suit in a federal court. A waiver of the former is by no means a waiver of the latter. *Chandler v. Dix,* 194 U.S. 590; *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275. Thus, the Federal District Court violated Colorado's sovereign immunity as provided under the 11th Amendment to the United States Constitution, when it exercised its jurisdiction over this case. *State of Missouri v. Fiske,* 290 U.S. 18.

III.

ASSUMING THE AMERICAN NATIONAL RED CROSS IS AN INSTRUMENTALITY OF THE UNITED STATES, CONGRESS HAS WAIVED ANY TAX IMMUNITY TO WHICH IT WOULD OTHERWISE BE ENTITLED IN THE INSTANT CASE. THE STATUTES WAIVING THE IMMUNITY BEING UNAMBIGUOUS ON THEIR FACE, RESORT CANNOT BE HAD TO LEGISLATIVE HISTORY IN THE FORM OF CONGRESSIONAL DEBATES.

Assuming arguendo that this Court should find that the Appellee, Red Cross, is an instrumentality of the United States, it is submitted that the Congress of the United States has nevertheless waived any and all im-

munity from state unemployment taxes to which it would otherwise be entitled. In this regard, 26 U.S.C., Section 3305(b) provides:

> "(b) Federal instrumentalities in general.—The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States; or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law. * * *"

Acting pursuant to the above statute, the State of Colorado made specific provision in the Colorado Unemployment Security Act for that Act to apply in instrumentalities of the United States. *Colorado Revised Statutes, Section* 82-1-3(8)(e).

Since 26 *U.S.C., Section* 3305(*b*) excludes from the waiver of immunity only those instrumentalities to which 26 *U.S.C., Section* 3306(*c*)(6) applies, the provisions of the latter section should be noted. That section specifically applies to two kinds of instrumentalities; those which are:

(A) Wholly or partially owned by the United States, or

(B) Exempt from the tax imposed by Section 3301 by virtue of any provisions of law which specifically refers to such section (or the corresponding section of prior law) in granting such exceptions.)

The Red Cross does not contend that it is either wholly

or partially owned by the United States, so the question of the applicability of Section 3306(c)(6) to the Red Cross turns on whether or not the Red Cross is within the scope of sub-paragraph (B) thereof. Namely, is it excluded from the tax imposed by Section 3301 and does the exempting statute specifically refer to Section 3301?

The Appellees contend that Section 3306(c)(8) makes specific reference to Section 3301 and that the Red Cross is thereby within the scope of Section 3306(c)(6) and immune from the tax imposed by the Appellant, Department of Employment. Reliance is placed upon the fact that when Section 3306(c)(8) is read together with opening sentence of Section 3306(c), the resultant passage provides:

> (c) For the purposes of this chapter, the term "employment" means . . . any service . . . except . . .
>
> (8) service performed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3). . . .

The question is simply this: Does the above quoted passage "specifically refer" to Section 3301. The Red Cross argues that the phrase, "For the purposes of this chapter," makes specific reference to every section in that chapter, including Section 3301. This interpretation flies in the face of the plain meaning of Section 3306(c)(6)(B), which imposes the "specific reference" requirement.

It cannot be logically argued that the requirement of "specific reference" to Section 3301 is met by a section which makes no mention whatsoever of Section 3301. Yet, this is the very thrust of Appellee's argument. The phrase, "For the purposes of this chapter" is at the very

most a general reference to the contents of that chapter; it is by no stretch of the imagination a *specific* reference to a particular section. The statute is unambiguous on its face, and it demands this construction. General reference will not suffice where specific reference is required.

The Red Cross attempts to bolster its position by reference to statements made by members of the House of Representatives when this legislation was in committee. It is submitted that no such reference is necessary for purposes of construing Section 3306(c)(6),(8). These provisions are clear and unambiguous on their face, and should be construed accordingly:

> "The meaning, intent and purpose of an unambiguous act must be obtained from the act itself and not from the expressions of legislators *or their committees.* Marche v. United States, (5CCA) 126 F.2d 671. United States v. Ogilvie Hardware Company, (5CCA) 126 F.2d 577. It is never permissible to allow the discussions and views of legislators, friendly or unfriendly to such legislation, to disparge the validity of the ultimate work of the legislative body. Any such impeachment in such manner of an unambiguous enactment would violate every principal of estoppel. The speeches of a legislator and the *discussions of an enactment in committee,* or even explanations of a witness before the committee as to the meaning, or intention or purpose of a statute is universally considered a very poor and impoverished source on which to rely to glean the legislative intent." *United States v. State of Mississippi,* 229 F.Supp. 925, 971; (Emphasis added.)

For, as this Court ruled in the case of *Aldridge v. Williams*, 44 U.S. 9, 24, the judgment of a court cannot be influenced by the construction placed upon a particular statute by members of Congress during the debate which took place on its passage, nor by their stated reasons for supporting or opposing the statute. That this doctrine applies equally to committee debates on the floor of either House is also clear. "Not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms. . . ." *Penn. Railroad Co. v. International Coal Co.*, 230 U.S. 184, 199.

The reasoning underlying the doctrine are partially applicable in the instant case, where only two committee members voiced their opinion:

> [I]t is impossible to determine with certainty what construction was put upon an act by members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." *United States v. Freight Association*, 166 U.S. 290, 318, 319.

The plain meaning of Section 3306(c)(6), (8), supra, clearly precludes any possibility that the Congress of the United States had any intention of retaining any tax immunities for charitable instrumentalities. The statute, being clear and unambiguous on its face, can have only one

meaning: even if the Red Cross is a governmental instrumentality, its immunity has been waived, and it is subject to the state tax levied by the Appellants.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

1. Title 10 U.S.C., Section 2602(a),(e), 67 Stat. 178, 179 is set forth as follows:

> (a) Whenever the President finds it necessary, he may accept the cooperation and assistance of the American National Red Cross, and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense.
> (e) For the purposes of this section, employees of the American National Red Cross may not be considered as employees of the United States.

2. Title 12 U.S.C., Section 30, 24 Stat. 18 is set forth as follows:

> Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on . . . with the approval of the Comptroller of the Currency, . . . but no change of name or location shall be valid until the comptroller shall have issued his certificate of approval of the same.

3. Title 12 U.S.C., Section 51(a), 48 Stat. 147 is set forth as follows:

> (a) [A]ny national banking association may, with the approval of the Comptroller of the Currency . . . issue preferred stock of one or more classes in such amount and with such par value as shall be approved by said Comptroller.

4. Title 12 U.S.C., Section 55, 19 Stat. 64 is set forth as follows:

If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 192 of this title.

5. Title 12 U.S.C., Section 71(a), 49 Stat. 704, 708 is set forth as follows:

If any national banking association violates the provisions of this section and continues such violation after thirty days' notice from the Comptroller of the Currency, the said Comptroller may appoint a receiver or conservator therefor, in accordance with the provisions of existing law.

6. Title 12 U.S.C., Section 93, 36 Stat. 1167 is set forth as follows:

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited.

7. Title 12 U.S.C., Section 192, 49 Stat. 721 is set forth as follows:

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver. . . .

8. Title 12 U.S.C., Section 215(a), 73 Stat. 460 is set forth as follows:

> (a) Any national banking association or any bank incorporated under the laws of any State may, with the approval of the Comptroller, be consolidated with one or more national banking associations located in the same State . . .

9. Title 26 U.S.C., Section 3301, 68 Stat. 439 is set forth as follows:

> There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per cent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938.

10. Title 26, U.S.C. Section 3305(b), 74 Stat. 983 is set forth as follows:

> (b) Federal Instrumentalities in General.—The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c)(6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec 484), and as modified by sub-section (c)), to

comply otherwise with such law. The permission granted in this subsection shall apply (A) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk; (B) only if such State law makes provisions for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event such State is not certified by the Secretary of Labor under section 3304 with respect to such year; and (C) only if such State law makes provision for the payment of unemployment compensation to any employee of any such instrumentality of the United States in the same amount, on the same terms, and subject to the same conditions as unemployment compensation is payable to employees of other employers under the State unemployment compensation law.

11. Title 26 U.S.C., Section 3306(c)(6),(8), 74 Stat. 983, 984, 986 is set forth as follows:

(c) Employment.—For purposes of this chapter, the

term "employment" means any service performed prior to 1955 which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either. (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while an employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—. . .

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption; . . .

(8) service performed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a); . . .

12. Title 28 U.S.C., Section 1253, 62 Stat. 928 is set forth as follows:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

13. Title 28 U.S.C., Section 1331(a), 72 Stat. 415 is set forth as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

14. Title 28 U.S.C., Section 1341, 62 Stat. 932 is set forth as follows:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

15. Title 28 U.S.C., Section 1345, 62 Stat. 933 is set forth as follows:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

16. Title 28 U.S.C., Section 2281, 62 Stat. 968 is set forth as follows:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

17. Title 36 U.S.C., Section 2, 61 Stat. 81 is set forth as follows:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four, and July twenty-seventh,

nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2, 3, 4a,—6, 8 and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

18. Title 36 U.S.C., Section 3, 67 Stat. 178 is set forth as follows:

The purposes of the corporation are and shall be—
First. To furnish volunteer aid to the sick and wounded of Armed Forces in time for war, . . .
Fourth. To act in matters of voluntary relief and in accord with the military authorities as a medium of communication between the people of the United States of America and their Armed Forces, . . .

19. Title 36 U.S.C., Section 5(a)-(c), 61 Stat. 82 is set forth as follows:

(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such functions as may from time to time be prescribed in the bylaws; . . .

(b) Thirty Governors shall be elected by the chapters. . . .

(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. . . .

20. Title 36 U.S.C., Section 7, 67 Stat. 179 is set forth as follows:

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

21. Title 42 U.S.C., Section 1855a., 64 Stat. 1109 is set forth as follows:

As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context: . . .

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

22. Colorado Revised Statutes, Section 82-1-3(8)(e) is set forth as follows:

Definitions.—As used in this chapter, unless the context clearly requires otherwise: . . .

(8) The term "employment" shall not include: . . .

(e) Service performed in the employ of the United States government, or a national bank or state bank

which is a member of the federal reserve system, or a federal savings and loan association or a state building and loan association which is a member of the federal home loan bank system, which institutions were, prior hereto, exempt from this chapter, or any other instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the federal security agency under section 1603(c) of the federal internal revenue code, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in section 82-9-9 with respect to contributions erroneously collected.

23. Colorado Revised Statutes, Section 82-9-9 is set forth as follows:

Refunds.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a

credit memo therefor, or make a refund thereof, in either event without interest thereon. In no event may an employing unit recover money paid erroneously, or otherwise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.